Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.

No. 87-1552

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

PETER STEFANOU,
Petitioner,

v.

NORTH RIVER INSURANCE COMPANY, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether judgment on the pleadings may be entered against a civil defendant who refuses to answer any of the allegations of the complaint on the basis of his Fifth Amendment rights, where (a) it is undisputed that answers to the vast majority of the allegations pose no danger of incrimination; and (b) even after a court ruling that the claim of privilege was improperly invoked, the defendant fails to move to amend his answer so as to respond to those allegations that pose no danger of incrimination.

RULE 28.1 LIST

Respondent North River Insurance Company is a wholly-owned subsidiary of Crum and Forster, Inc. Crum and Forster is a wholly-owned subsidiary of Xerox Financial Services, Inc., which is a wholly-owned subsidiary of Xerox Corporation.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 831 F.2d 484 and is reprinted at App. 1a-7a.[1] The district court's unreported order is reprinted at App. 23a-24a, and its unreported oral opinion is reprinted at App. 8a-21a.

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[1] In keeping with the method used in the petition, references herein to "App." are to the Appendix to the petition. References to "C.A." are to the Joint Appendix filed in the Court of Appeals. References to "Pet." are to the petition itself. References to "¶" are to the paragraphs of the complaint in this case, which is included in the Appendix to the petition at pages 28a-44a.

JURISDICTION

The judgment of the court of appeals was entered on October 16, 1987. App. 26a. A timely petition for rehearing, with a suggestion for rehearing en banc, was denied on December 21, 1987. App. 27a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself. . . .

RULE OF CIVIL PROCEDURE INVOLVED

Rule 8(d) of the Federal Rules of Civil Procedure provides in pertinent part:

> Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading.

STATEMENT OF THE CASE

Beginning in November 1981, respondent North River Insurance Company ("North River") issued a series of accountants' professional liability insurance policies to the accounting firm of Frank & Co., P.C. and a number of its partners and employees, including petitioner Peter Stefanou ("Stefanou"). App. 35a, 49a. In issuing the policies, North River relied on applications representing that Stefanou had no knowledge of facts or circumstances that might give rise to a claim. App. 37a-39a. After the policies issued, Stefanou pled guilty to three criminal tax offenses, and was sued for involvement in a tax fraud scheme dating back to 1980. App. 2a, 35a, 49a. That scheme was masterminded by one Edward Marko-

witz, who pled guilty to creating over $500,000,000 in false tax deductions for investors in various partnerships and limited partnerships he had organized. Stefanou had provided accounting services to Markowitz and Markowitz-related entities. App. 2a, 31a-34a, 48a-49a; C.A. 65-66, 119. As part of his plea bargain, Stefanou was granted immunity from prosecution for certain criminal violations, including criminal tax violations, arising from his involvement with 40 named companies, including many Markowitz-related ones. App. 3a; C.A. 50-54.

Upon learning of Stefanou's plea, North River sued him and the other insureds for rescission of the policies, on the ground that the policy applications contained material misrepresentations of fact concerning the insureds' knowledge of facts and circumstances likely to give rise to a claim. App. 2a, 28a-44a. Stefanou refused to answer *any* of the allegations of the complaint, simply stating in a footnote to the other defendants' answer that:

> Defendant Peter Stefanou, upon the advice of counsel, respectfully declines to answer the allegations set forth in plaintiff's complaint on the basis of his constitutional rights.

App. 45a. Stefanou made this blanket refusal to answer the complaint even though responses to the vast majority of the allegations could, under no circumstances, be deemed incriminating.[2]

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[2] For example, Stefanou refused to answer allegations concerning jurisdiction and venue (¶¶ 1-3), the identity of the parties (¶¶ 4-14), the existence of a civil suit against him (¶ 29), the terms of and facts about the insurance policies in question (¶¶ 30-51), the materiality of the representations in the policy applications (¶¶ 55, 64), the existence of a dispute among the parties (¶ 59), the nature of relief being sought (¶¶ 61, 67) and North River's willingness to return the premiums paid for the policies (¶ 62). App. 3a, 29a-44a. Nor would Stefanou admit or deny that he had pled guilty to several counts of tax fraud (¶ 25), even though his plea was made in open court and is a matter of public record. App. 3a.

For the same reason and in the same manner, Stefanou refused to respond to a request for admissions filed by North River, even though he had failed to make any objection to the requests within the time required by local rule. C.A. 175.

North River moved for judgment on the pleadings, contending that Stefanou's blanket invocation of the Fifth Amendment was improper and thus his failure to deny the allegations of the complaint constituted an admission of those allegations under Fed. R. Civ. P. 8(d). App. 3a; C.A. 68-77. North River also moved to have its requests for admissions deemed admitted on the basis of Stefanou's improper and untimely objections to the requests.

The district court granted the motion for judgment on the pleadings against Stefanou on the ground that Stefanou's indiscriminate claim of privilege did not allow the court to determine whether "there had been some consideration of each allegation as to whether it would [incriminate him] or not." App. 17a. In its written order, the district court confirmed that "the attempted invocation by the defendant Peter Stefanou of his Fifth Amendment right not to answer the allegation [sic] of the complaint was ineffective and improperly done." App. 23a. North River's motion to deem its requests for admissions admitted likewise was granted by a magistrate. C.A. 155. The district court thereafter denied motions to reconsider each of the orders. App. 25a; C.A. 197. At no time did Stefanou file a motion for leave to amend his answer, even after the district court ruled that his blanket invocation of the Fifth Amendment was improper.

On appeal, the Fourth Circuit affirmed the district court's order granting judgment on the pleadings. The court of appeals acknowledged that, when properly invoked, the privilege against self-incrimination can avoid the operation of Rule 8(d), but noted that "the mere

'blanket refusal to answer questions does not suffice to raise constitutional questions.'" App. 4a (citations omitted). A proper invocation of the Fifth Amendment, the court ruled, requires the defendant to "answer those allegations that he can and to make a specific claim of privilege as to the rest." *Id.* Only then is "an informed ruling on the claim" possible. App. 5a. "Under the circumstances of this case," the court held that Stefanou's "blanket refusal to answer or respond was not sufficient." *Id.*

The Fourth Circuit rejected Stefanou's argument that it was the district court's responsibility to "pierce his blanket assertion of privilege to determine its merits" as to each allegation of the complaint. Rather, the court stated, a party seeking to make a good faith assertion of the privilege must do so with sufficient particularity to allow an informed ruling on the claim. *Id.* The court found that Stefanou could have answered many of the allegations of the complaint without fear of incrimination. "Instead, he chose a course of action which left the district court with no reasonable alternative other than to enter judgment against him." App. 6a (citation omitted).

The court also rejected Stefanou's alternative argument that the case should be remanded to the district court with instructions to allow him to amend his answer. It declined to consider that argument on appeal, because Stefanou had not filed a motion for leave to amend his answer in the district court. App. 6a.

ARGUMENT

The Court should deny the petition because (1) the court of appeals' decision is correct and fair, and (2) there is no conflict between the court of appeals' decision and any decision of this Court or any court of appeals.

1. *The Court of Appeals' Decision Is Correct And Fair.*

The Fourth Circuit's decision that only the *proper* invocation of the privilege against self-incrimination can

avoid the operation of Rule 8(d) is correct and in accord with settled law. App. 4a. *See, e.g.*, 5 C. Wright & A. Miller, *Federal Practice & Procedure* § 1280 at 360 (1969); *Davis v. Fendler*, 650 F.2d 1154, 1159-60 (9th Cir. 1981). The party claiming the privilege is required "to answer those allegations he can and make a specific claim of privilege as to the rest." 5 C. Wright & A. Miller, *Federal Practice & Procedure* § 1280 at 360. *See General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1212 (8th Cir. 1973), *cert. denied*, 414 U.S. 1162 (1974) (privilege must be asserted with respect to particular allegations). The mere "blanket refusal to answer questions does not suffice to raise constitutional questions," *United States v. Carroll*, 567 F.2d 955, 957 (10th Cir. 1977), because "it forces the reviewing court to speculate as to which questions would tend to incriminate." *Anglada v. Sprague*, 822 F.2d 1035, 1037 (11th Cir. 1987).

The cases cited by Stefanou in Section I of his petition are readily distinguishable. Each of them addresses a situation in which the assertion of the privilege may result in the imposition of sanctions for willful, criminal conduct. None of petitioner's cases involves the operation of Fed. R. Civ. P. 8(d), which, by contrast, does not depend on the intent of the pleader. Nor is any such criminal sanction involved here.[3]

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[3] Several cases cited by Stefanou, *e.g.*, *Garner v. United States*, 424 U.S. 648 (1976), *United States v. Murdock*, 290 U.S. 389 (1933), and *United States v. Grabinski*, 558 F. Supp. 1324 (D. Minn. 1983), *modified on other grounds*, 727 F.2d 681 (8th Cir. 1984), involved prosecutions under 26 U.S.C. § 7203 (or identical predecessor statutes) against taxpayers who improperly asserted the Fifth Amendment on their tax returns. Since § 7203 explicitly states that only a willful failure to file a return is a violation of the statute, a defendant could not properly be convicted for an erroneous claim of Fifth Amendment privilege asserted in good faith. Consequently, this Court noted that the protection afforded by § 7203 is broader than the protection provided by the Fifth

In addition, Stefanou's reliance on *Maness v. Meyers*, 419 U.S. 449 (1975), and *Hoffman v. United States*, 341 U.S. 479 (1951), simply ignores the distinction between the "threshold" issue of whether the Fifth Amendment was validly invoked so as to raise a constitutional question, and the quite different and subsequent issue of the consequences of an effective and proper, but possibly erroneous, assertion of the Fifth Amendment. The cases relied on by petitioner address the latter issue, while it is the former issue that is presented in this case. *See, e.g., United States v. Yurasovich*, 580 F.2d 1221 (3rd Cir. 1978) (court must determine whether, as to a particular question, the answer sought might be incriminating, only after a "prima facie claim of privilege is raised," citing *Maness* and *Hoffman*).

Moreover, the Fourth Circuit's decision does not raise the broad questions articulated by Stefanou in his petition. The opinion is not a sweeping pronouncement that a defendant who properly asserts a claim of privilege can have judgment entered against him if a court later determines that a response to a particular inquiry would not be incriminating. Rather, the court of appeals simply decided that "*under the circumstances of this case*" (emphasis added) the Fifth Amendment privilege was not validly invoked in the first instance, and

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Amendment. 424 U.S. at 663. The Court also noted that in situations other than a § 7203 prosecution, a mere erroneous assertion of the privilege warrants a sanction. 424 U.S. at 663 n.18, citing *Maness v. Meyers*, 419 U.S. 449, 460-61 (1975).

Finally, the Court expressly rejected the contention that the Fifth Amendment guarantee requires a preliminary procedure for testing the validity of an asserted privilege before a defendant can be sanctioned for erroneously claiming the privilege: "The Court previously has considered Fifth Amendment claims in the context of a criminal prosecution where the defendant did not have the benefit of a preliminary judicial ruling on a claim of privilege. It has never intimated that such a procedure is other than permissible." 424 U.S. at 664.

was therefore insufficient to avoid the operation of Fed. R. Civ. P. 8(d). The "circumstances of this case" reflect an exercise in procedural gamesmanship by Stefanou. After twice requesting and obtaining additional time to file an answer, Stefanou then simply refused to respond to anything in the complaint. He made no attempt whatsoever to distinguish between the relatively few allegations calling for answers that might be incriminating, and the vast majority of those calling for answers that unquestionably could not incriminate him.[4]

The "circumstances of this case" also include the simple fact that Stefanou never once moved for leave to file an amended answer, even after the district court ruled that his blanket assertion of a claim of privilege was improper. Consequently, the suggestion in Stefanou's petition that this case involves a situation in which "the defendant is not permitted to replead" (Pet. (i)) is simply wrong. Whether Stefanou should have been permitted to replead is not, and has never been, an issue in the case. Since Stefanou did not request the opportunity to replead in the district court, the Fourth Circuit properly noted that that issue would not be addressed on appeal.[5]

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[4] As noted previously, Stefanou refused to answer such obviously nonincriminating allegations as those relating to diversity jurisdiction and venue, the fact that North River is an insurance company, and the fact that Stefanou applied for and obtained an insurance policy from North River. Stefanou also refused to admit or deny that he pled guilty to several counts of tax fraud, even though his plea was made in open court and is a matter of public record. The situation here contrasts sharply with that in *Hoffman v. United States*, 341 U.S. 479 (1951), where this Court reversed a criminal contempt conviction based upon a witness's refusal to answer questions. In *Hoffman*, every one of the questions that the defendant refused to answer "could easily have required answers that would forge links in the chain of facts imperiling petitioner with conviction of a federal crime." 341 U.S. at 488.

[5] Petitioner contends that he had no opportunity to reconsider his assertion of the privilege. Pet. 4-6, 8. To the contrary, he had

Finally, the court of appeals' decision has not "ignored settled law in this Circuit," as the dissent suggests. App. 7a. The "settled law" cited by the dissent does not address the issues in this case. *Mills v. United States*, 281 F.2d 736 (4th Cir. 1960), stands for the proposition that there is no "ritualistic formula or talismanic phrase" required to invoke the Fifth Amendment privilege, so long as the court reasonably understands that the speaker is attempting to invoke the privilege. 281 F.2d at 740, 741 (citations omitted). However, the fact that Stefanou referred to his "Constitutional rights" rather than "the Fifth Amendment," or that he did so in a footnote rather than the text, has never been the issue in this case, and it certainly is not raised by the petition. Rather, it is the dozens of allegations that Stefanou could have answered but did not, that made his invocation of the privilege improper. *See* App. 3a-6a. To the extent that *Mills* addresses that issue, *see* 281 F.2d at 740-41, it supports the majority's opinion, in that the only two questions the witness in *Mills* refused to answer were obviously incriminating.

2. ***There Is No Conflict Between The Fourth Circuit's Decision And Any Decision Of This Court Or Any Court Of Appeals.***

Contrary to petitioner's assertion, there is no conflict between the decision below and *Rogers v. Webster*, 776 F.2d 607 (6th Cir. 1985), or *National Acceptance Co. of America v. Bathalter*, 705 F.2d 924 (7th Cir. 1983). These decisions are distinguishable from the decision

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every opportunity to seek leave to amend his pleadings, but, as the court of appeals found, he simply "did not seek to amend or otherwise alter his position." App. 3a. Stefanou twice (once in his opposition to the motion for judgment on the pleadings and once in his motion for reconsideration) said that he would seek leave to amend if the court ruled against him. C.A. 93, 146-47. He never did so, however. Having made the tactical decision not to file a motion to amend, petitioner cannot now fairly argue that he was not permitted to replead.

below in several significant respects. Neither *Rogers* nor *Bathalter* considered, much less decided, whether a blanket refusal to respond to all averments in a pleading constituted a proper or valid assertion of the Fifth Amendment privilege. Those cases simply held that a *proper* or *valid* invocation of the privilege in response to specific allegations precludes a determination that the allegations are admitted.[6] Consequently, the Fourth Circuit properly determined that neither of those cases was "dispositive of the issue presented here" since "neither case dealt with the threshold issue of whether the Fifth Amendment privilege has been properly asserted so as to allow the district court to make a reasonable assessment of the risk of incrimination." App. 4a.

Unlike North River, which expressly challenged Stefanou's blanket assertion of privilege before the district court, the plaintiffs in *Bathalter* and *Rogers* never raised that threshold issue. Accordingly, in *Bathalter*, the Seventh Circuit ruled that the district court correctly had assumed it could not compel the defendant to respond to the complaint, because the plaintiff "did not take issue with the propriety of claiming the privilege." 705 F.2d at 927. Likewise, there is no suggestion in *Rogers* that the plaintiff in that case ever challenged the nature of the defendant's invocation of the privilege. Indeed, although the Sixth Circuit disapproved of the defendant's blanket assertion of the privilege, it noted that the district court had not addressed the issue. 776 F.2d at 611 n.4.

Moreover, *Rogers* and *Bathalter* can be distinguished from this case on the further ground that neither of those cases involved an indiscriminate refusal to respond

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[6] The Fourth Circuit does not take a different position. "[W]hen properly invoked, the fifth amendment privilege against self-incrimination, which applies to civil proceedings as well as criminal, can avoid the operation of Rule 8(d)." App. 3a-4a.

to clearly nonincriminating allegations. In *Bathalter*, the Seventh Circuit noted that "[t]he allegations of the complaint are such that an affirmative answer to almost any one of them would provide either direct evidence of criminality or 'a link in the chain of evidence needed to prosecute.'" 705 F.2d at 927 n.5 (citations omitted).

Similarly, in *Rogers*, the defendant refused to comply with two orders of the district court, and the plaintiff moved to have him held in both civil and criminal contempt. *See* 776 F.2d at 607. In lieu of answering the specific averments against him or filing counter-affidavits, the defendant invoked his privilege against self-incrimination. *Id.* at 611. Because the same conduct formed the basis of the civil and criminal proceedings against him, any answer to the civil charges would have applied equally to the criminal charges and, therefore, posed a threat of incrimination.

Two courts have correctly resolved the issues presented by this case. There is no conflict between the decision below and any decision of this Court or any court of appeals. Further review therefore is not warranted.[7]

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[7] In the alternative, the judgment of the court below can be defended on the ground that Stefanou failed to interpose timely objections to dispositive requests for admissions filed by North River. (Stefanou has conceded that a ruling in North River's favor on its requests for admissions "would deem all essential elements of its case admitted." C.A. 101.) The issue was raised and briefed in both the district court and the court of appeals, but not ruled on by either court. App. 7a. A prevailing party can "defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals." *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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